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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2030

ROBERT L. BOSTICK, ET AL., *Petitioners,*

v.

DANIEL J. BOORSTIN, As the Librarian for the Library of Congress, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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ROBERT L. BOSTICK, ET AL., *Petitioners,*

v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Robert L. Bostick, et al. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 22, 1980, and the Orders denying Petitioners' Motion for Rehearing and Suggestion for Rehearing *en banc* entered on March 24, 1980.

OPINIONS BELOW

The initial decision of the district court (App. 1a) was entered on August 20, 1973 and is reported at 6 E.P.D. ¶ 8785. The initial Court of Appeals decision (App. 10a) dismissing an interlocutory appeal from the District Court Decision, is reported at 511 F.2d 363 (D.C. Cir. 1975). This Court denied certiorari, 423 U.S. 828 (1975). The most recent district court decision (App. 26a) is unreported. The most recent Court of Appeals decision (App. 45a) is reported at 22 E.P.D. ¶30,682.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 22, 1980. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on March 24, 1980, and this Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the typicality requirement of Fed. R. Civ. P. 23 can be interpreted to require factual identity of the claims of all class members in a Title VII employment discrimination case?

2. Whether a class action is a superior method of adjudicating claims of systemic discrimination by Federal employees?

3. Whether the lower courts erred by failing to consider fashioning class relief in light of unrefuted evidence of racially motivated employment discrimination against the class, even though the "class represen-

tative" did not prevail on his individual claim and the court did not certify a class?

4. Whether the lower courts erred by misinterpreting and misapplying the statistical and graphic evidence establishing a statistically significant disparity between the annual salaries and grade levels of similarly situated black and non-black employees attributable to race?

STATUTORY PROVISIONS INVOLVED

Rule 23(a) reads:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) reads:

> Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

42 U.S.C. § 2000e-16 provides:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to

aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall —

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit an order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment:

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically

obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to —

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the

Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

STATEMENT OF THE CASE

Petitioner Bostick is a black employee of the Library of Congress. On or about April 29, 1972, Bostick filed a formal Complaint alleging discrimination with the Equal Employment Opportunity (EEO) Office of the Library of Congress. He claimed that from the time he began his employment with the Library in 1947 he had been subject to racial discrimination with regard

to his job classification and promotion. Four months later he amended his Complaint and alleged discrimination affecting all other black employees of the Library. In November 1972 the EEO Office returned the Amended Complaint, stating that it was not equipped to handle broad inquiries into the general policies and practices of the Library.

In August 1972, another black Library employee, Joslyn Williams, filed an action in the district court, alleging that he was the victim of racially discriminatory practices at the Library. On March 20, 1973, an Amended Complaint was filed, adding Bostick as a plaintiff as well as class-wide allegations of discrimination. The Amended Complaint alleged that the Library had discrininated against all blacks currently employed by it, all blacks who had been employed at any time since 1960, and all blacks who had sought employment unsuccessfully since 1960. The Amended Complaint sought relief on behalf of the individuals and both injunctive and monetary relief for the class as a whole.

On August 20, 1973, after a hearing, the district court denied the request for class certification. The denial was based on two grounds: First, that Williams' and Bostick's positions at the Library were not typical of the class they sought to represent as required by Rule 23(a)(3), Federal Rules of Civil Procedure. Second, given the administrative remedies available to federal employees apart from Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, the class action was not "superior to other available methods for fair and efficient adjudication of the controvery" as required by Fed.R.Civ.P. 23(b)(3). Petitioners attempted to obtain review of the district court's decision, but it

was denied, on the grounds that the decision was not a final order.

In March 1978, Bostick's case went to trial. The district court failed to award either individual or class relief, despite the fact that the unrefuted testimony indicated that from 1947 through at least 1972 the Library had engaged in numerous illegal, discriminatory practices including among others: the failure and refusal to recruit black applicants; the promotion of white employees through word-of-mouth procedures; the demeaning of individual black employees; the refusal to place blacks in positions of responsibility; the placement of blacks with higher educational qualifications in the same positions as whites with lower educational qualifications and the promotion of white employees with lower educational qualifications to higher positions than blacks who possessed higher educational.

Black employees of the Library as of 1972 were occupying lower grades and receiving lower salaries than similarly situated white employees and this significant difference was attributable to race, as the Library's own statistician concluded. The evidence of racial discrimination which resulted in pay and grade disparities between blacks and whites was corroborated by the Library's own studies. When the Library itself analyzed the pay and grade levels of its employees, it concluded that there was a clear relationship between race and grade: blacks were on the average two grades below whites, with commensurately lower salaries.

The Library's Administrative Hearing Examiners each independently concluded that the Library had engaged in systemic racial discrimination after 1972. The Report issued by the Special Inquiry Team of the

American Library Association indicated that the Library had consistently restricted the employment opportunities of blacks. The numerous reports which the Library itself requested after 1972 found, without qualification, that the Library had employed, before and afater 1972, racially discriminatory written examinations for purposes of hiring and promotions. The Library utilized requirements which had a racially disparate effect, as shown by the racial mix of those ultimately selected for hire or promotion before and after 1972; and the Library utilized, before and after 1972, non-objective standards for selection and promotion which had the effect before and after 1972 of restricting the advancement of black employees.

Bostick's "reclassification" problem was one classically experienced by blacks at the Library. The use of the classification procedures to discriminate against black Library employees by relegating them to lower positions within the Library was confirmed by the American Library Association, Library of Congress Inquiry Team Report. Prior to 1972, there existed in the Library an "invisible ceiling" above which blacks were not promoted.

Up to 1972, there was a practice and pattern of racial discrimination at the Library which had a continuing impact on tenured employees. There was a statistically significant difference in salary and grade levels at the Library which was attributable to race, after control variables were accounted for. In fact, Defendant's expert quantified the amount of the discrimination. He concluded that as a result of the discriminatory practices, black employees of the Library had been deprived of a sum of approximately $8,409,160 in wages during the years 1974-76 alone that they would have earned had they been white.

Yet, despite this evidence, the district court declined to order any relief. Petitioners then appealed to the Court of Appeals for the District of Columbia. The Court of Appeals' review of the class certification decision was limited to a footnote, and a petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I. On an Important Question of Federal Law, the Decision of the District of Columbia Circuit Court of Appeals is in Direct Conflict with the Decisions of Other Circuits.

A. The Courts Below Misconstrued the "Typicality" Requirement of Rule 23, As Applied to Class Actions Under Title VII.

The decision of the Court of Appeals, affirming the district court's denial of class certification on the grounds of lack of typicality, adopted a seriously flawed reading of the typicality requirement. This narrow view of the requirement, which focused on the necessarily differing factual circumstances of each employee, represented an extreme minority view at the time it was expressed; as of this date, all of the cases on which the court below relied have either been reversed or have been substantially discredited. The District of Columbia Circuit now stands alone in its severely restrictive interpretation of the typicality requirement.

The decision denying class certification in this matter was premised upon a case which was subsequently overturned by the Fifth Circuit sitting *en banc, Huff* v. *N.D. Cass Company of Alabama,* 4 E.P.D. ¶7833 (N.D. Ala. 1971), *reversed*, 485 F.2d 710 (5th Cir. 1973) (*en banc). Williams* v. *Mumford*, 6 E.P.D. ¶8785 at p.

5385. This error was compounded by the lower courts' misconstruction of the typicality requirement of Rule 23 of the Federal Rules of Civil Procedure ("F.R.C.P.")

The district court incorrectly held that under the typicality requirement, the employment position of the class representative must be typical of each member of the class. App. 3a-5a. Under this definition there could never be a class of black employees seeking to remedy effects of systemic discrimination. By this definition, a class could consist only of those persons occupying the very same employment position as the person who seeks to sue. Discrimination would have to be opposed on a job function by job function basis. Neither Rule 23 nor Title VII intended such a piecemeal remedy.

The lower courts apparently believed that the typicality requirement of F.R.C.P. 23(a)(3) should not be relaxed in Title VII cases. This notion is contradicted by the opinions of other Circuits. *Senter* v. *General Motors Corp.*, 532 F.2d 511, 517, 523-24 (6th Cir. 1976), *cert. denied,* 429 U.S. 870 (1976); *Wright* v. *Stone Container Corp.*, 524 F.2d 1058, 1061-62 (8th Cir. 1975).

No precedent supports the restrictive interpretation of the typicality requirement applied by the lower courts. The district court held that simply because the representative plaintiff's employment position was held by no other members of the class he sought to represent, his position was unique and therefore he was not typical. 6 E.P.D. at 5385. However, Rule 23 does not focus on the *position* of the representative plaintiff; it requires only that the *claims* of the plaintiff be typical of those of the class. *Payne* v. *Travenol Laboratories,* 565 F.2d 895, 900 (5th Cir. 1978); *Alexander* v. *Aero Lodge No. 735,* 565 F.2d 1364, 1372 (6th Cir. 1977);

Donaldson v. *Pillsbury Co.*, 554 F.2d 825, 830-831 (8th Cir. 1977); *Gibson* v. *Local 40,* 543 F.2d 1259, 1264 (9th Cir. 1976). This was a fundamental error by the court in denying certification.

The representative plaintiff in this case alleged no unique instances of discrimination directed at him as an individual. He alleged that the racial discrimination which he suffered exemplified the pervasive racial discrimination at the Library. Even if Bostick's job position is unique, his claims were not. They involved the way in which the Library's classification program was utilized in a discriminatory manner against minorities, a claim typical of the class. Indeed, if the position of the lower courts were adopted, there could never be a class of persons discriminated against.

The typicality requirement of Rule 23(a)(3) is satisfied when the class representative demonstrates the existence of other class members with "similar" or "typical" grievances. *Wright* v. *Stone Container Corp., supra,* 524 F.2d at 1062.

Under the lower courts' narrow reading of typicality, virtually no class action could be maintained unless the named plaintiff's employment position mirrored that of the class members. Such a requirement would impose a crushing burden upon Title VII class action plaintiffs.

B. The Court's Holding that a Class Action Is Not a Superior Method of Adjudication for Federal Employee Discrimination Claims Is Clearly Erroneous.

In denying class certification, the district court also held that plaintiffs had failed to satisfy the "superiority" requirement of F.R.C.P. 23, on the grounds that the Federal Government had already pro-

vided an effective mechanism for remedying discrimination complaints and that while a class action might be a superior method of adjudication for private Title VII litigants, Federal employees had no need for class action suits to redress their discrimination complaints.

> "[U]nlike the situation of the employee in the private sector effective administrative remedies against racial discrimination are available to federal employees outside of Title VII, and the need for class action adjudication is less apparent than in instances in which Title VII alone is in the picture." App. 6a.

Again, the district court's opinion rests on a faulty premise. Under its analysis, there could never be any title VII class-action litigation against the Federal Government because there are administrative procedures geared to resolving these sorts of complaints in the Federal Government.

The court's opinion completely ignores and in fact totally contradicts the 1972 amendments to Title VII, which extended the guarantees of equal employment opportunities to Federal employees. 42 U.S.C. § 2000e-16.

This Court recognized the importance of the 1972 legislation by its reference to the legislative history of those amendments in *Morton* v. *Mancari,* 417 U.S. 535, n.22 546-47, (1974):

> "This disproportionate distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policymaking and supervisory positions indicates the government's failure to pursue its policy of equal opportunity."
>
> "A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanc-

> ed the goal of the elimination of discrimination in Federal employment. . . ."
>
> "The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly. . . ."

The existence of administrative procedures does not rule out the propriety of class actions in federal employment cases brought pursuant to Title VII. Such a result would defeat the spirit and intent of the 1972 amendments. Class actions involving federal employee discrimination complaints are not only proper, but are necessary, to effectuate the Congressional intent. *See, e.g., Williams* v. *Tennessee Valley Authority,* 552 F.2d 691, 697 (6th Cir. 1977).

II. The District Court's Refusal To Grant Class Relief In Light Of Admitted Systemic Discrimination Violates The Purpose And Intent Of Title VII And Is In Conflict With The Law Of Other Circuits.

In Title VII cases the federal courts have not only the power but the duty to consider the effects of the employer's alleged discrimination on the class; this duty exists whether or not the suit is brought or certified as a class action, and the court is obligated to provide relief to affected employees, whether or not it awards relief to the individual plaintiff. In failing to fulfill this obligation, the lower courts erred.

The courts below ignored the voluminous, uncontradicted evidence of class-wide discrimination at the Library and declined to grant any relief to the class.

This refusal effectively repealed the protective provisions of Title VII, leaving the class of discriminated-against employees with no means of ameliorating the pervasive racial discrimination at the Library.[1]

The district court assumed that a *prima facie* case had been proved, but determined that Bostick's claims had been effectively rebutted by the Library. In so doing, however, the lower courts did not consider the effect that the Library's discriminatory practices had on the class. This failure was clear error. The court has a duty to assess evidence of discriminatory conduct against the class regardless of whether it has certified a class action or determined that the plaintiff's individual claim has merit.

The courts have recognized that Title VII discrimination suits are by their very nature class actions, whether or not they are denominated as such. In *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1201-02 (7th Cir. 1971), the Court held:

> "The vindication of the public interest expressed by the Civil Rights Act constitutes an important facet

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[1] The courts' failure to assess the impact of the evidence of class-wide discrimination coupled with the Library's refusal to comply with minimum federal affirmative action standards effectively insulates the Library from persons seeking relief from its discriminatory employment practices. The Library takes the position that it is not required to (nor in fact does it) meet the affirmative action guidelines of the Civil Service Commission or the Equal Employment Opportunity Commission. Trial Testimony of Dr. Eugene Walton, Coordinator of the Affirmative Action Programs at the Library, pp. 641-42, 653, 659-60. Its failure to meet these minimum standards is in direct defiance of the express language of Title VII which specifically include the Library as being within its scope (42 U.S.C. § 2000e-16a) and which direct the Librarian of Congress to fulfill the responsibilities granted to the Civil Service Commission with respect to the Library's employment practices, a mandate which is blatantly ignored.

of private litigation under Title VII. In *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969), Judge Kerner recognized that such a suit is necessarily a class action 'as the evil sought to be class characteristic, i.e., race, sex, religion or national origin.' See also *Jenkins* v. *United Gas Corporation,* 400 F.2d 28, 33 (5th Cir. 1968). At stake, therefore, are the interests of the other members of that class, and the court has a special responsibility in the public interest to devise remedies which effectuate the policies of the Act as well as afford private relief to the individual employee instituting the complaint.

Section 706(g) of the Act grants to federal courts plenary powers to fashion affirmative relief eradicating present discrimination and redressing the adverse consequences of past unlawful conduct . . . In Bowe, we held that this power 'should be broadly read and applied so as to effectively terminate the practice and make its victims whole.' 416 F.2d at p. 721. In order to accomplish that result, we ordered that the 'relief should be made available to all who were so damaged whether or not they filed charges and whether or not they joined in the suit.' *Id.;* Cf. *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 224, 84 S.Ct. 1226, 12 L.Ed.2d 256 at 1201-02." (citations omitted)

Similarly, in *Saracini* v. *Missouri Pacific Railroad Co.*, 431 F. Supp. 389, 395 (E.D. Ark. 1977), the Court held:

"Despite the fact that this case was not brought as a class action, this court is of the opinion that general relief would be appropriate . . . Title VII cases inherently involve discrimination against a class characteristic, [citing *Parham, supra,*] and under this reasoning, courts have upheld class-type injunctive and affirmative relief in cases by individual plaintiffs."

Where racial discrimination has been alleged, the district court has not merely the power but the duty to render a decree which will, as far as possible, eliminate discriminatory effects of the past as well as bar like discrimination in the future. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 1008 (1975).

The remedial provision of Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), which provides that a court may enjoin and order such affirmative action as may be appropriate, must be broadly read and applied so as to effectively terminate the practices of racial discrimination and make its victims whole. The relief contemplated by Title VII is intended to restore those wronged to their rightful status absent the effects of the unlawful discrimination. *Rosen* v. *Public Service Electric and Gas Company,* 477 F.2d 90, 96 (3d Cir. 1973); *Robinson* v. *Lorillard Corp.,* 444 F.2d 791 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971).

In *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421, 428-29 (8th Cir. 1970), the court noted the flexibility in awarding relief which is authorized by Title VII:

> [O]nce a violation of Title VII has been found, courts possess wide discretion in modeling decrees to insure compliance with the 1964 Civil Rights Act . . . In the exercise of that discretion, courts have devised various remedies for Title VII violations. [United States v. International Brotherhood of] Electrical Workers Local 38, supra, 428 F.2d 144 [6th Cir. 1970] (case remanded to district court with directions to retain jurisdiction and determine appropriate affirmative relief); [United States v.] Sheet Metal Workers, Local 36, supra, 416 F.2d 123)[8th Cir. 1969] (locals ordered to modify

> employment-referral systems programs); United States v. Hayes International Corporation, 415 F.2d 1038 (5th Cir. 1969 (preliminary injunction granted); [United States v.] Plumbers Local 73, supra, 314 F.Supp. 160 [S.D. Ind. 1969] (union's apprenticeship program revised, court retaining continued jurisdiction to insure compliance); (United States v. Bethlehem Steel Corporation, supra, 312 F.Supp. 977 (W.D.N.Y. 1970) (extensive plan for ending discriminatory seniority rights adopted).

Thus, whether or not an individual plaintiff establishes his or her own right to relief, the evidence introduced in the case may, as in this case, be of such a nature as to establish a pervasive policy of discrimination against minorities. In such circumstances, a court is obligated to consider and grant relief to the other minorities being discriminated against whether or not the plaintiff proves his individual claim and whether or not the court has certified a class. *See Sledge* v. *J.P. Stevens & Co., Inc.*, 585 F.2d 625, 634 (4th Cir. 1978); *Bolton* v. *Murray Envelope Corporation*, 553 F.2d 881, 883 (5th Cir. 1977); *Gibson* v. *Local 40, Supercargoes and Checkers of the Int'l. Longshoremen's and Warehousemen's Union*, 543 F.2d 1259, 1263 (9th Cir. 1976); *Barnett* v. *Martin-Marietta Corp.*, 522 F.2d 333, 340 (10th Cir. 1974); *Huff* v. *N.D. Cass Co.*, 485 F.2d 710 (5th Cir. 1973) (*en banc*). *See also, Parham* v. *Southwestern Bell Telephone Co., supra; Saracini* v. *Missouri Pacific Railroad Co., supra*, 431 F.Supp. at 396.

Moreover, the courts' failure to assess the impact of Defendant's discriminatory practices on the class, which were exactly like those found to exist in *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), is in direct conflict with the fifth Circuit's

ruling in that case. There, as here, evidence was introduced to demonstrate that there were no objective criteria for purposes of job selection and promotion but rather that wholly subjective non-validated criteria were employed by the Defendants. Furthermore, the evidence in both cases clearly established gross disparities in the wages earned by black and white employees, the use of subjective evaluations of employees by predominantly white supervisors. In both cases, the employers presented defenses based on nonvalidated testing and the nature and quality of educational levels achieved by the employees. The Fifth Circuit in *James* found that such evidence clearly established a case of racial discrimination. The District of Columbia Circuit essentially ignored this evidence.[2]

III. The Lower Courts' Misapplication Of The Relevant Statistical And Graphic Analyses Demonstrating Statistically Significant Disparities Between Black And Non-Black Employees Attributable To Race Is A Substantial Error Requiring Review And Guidance By This Court

The lower courts miscontrued the nature and function of statistical evidence and improperly applied its conclusions to the facts presented by the experts.

Both the Library and Bostick presented expert witnesses with regard to an analysis of pay disparities between black and white employees at the Library.

Bostick's expert was Dr. Charles Mann and the Library's expert was Dr. C.J. Bartlett. Both concluded

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[2] The critical deficiency in the decision of the Court of Appeals is that it considered this evidence only as applied to Bostick and not as to its class-wide impact. App. 4a n. 9.

that there were statistically significant pay disparities attributable to race between black and white employees prior to 1972 and that the black employees of the Library hired prior to 1972 and still within the Library were suffering the present effects of past discrimination.

In both analyses of pay disparity and race, Bostick was specifically included within a group which showed a statistically significant disparity between similarly situated white and black employees.

Specifically with regard to long-term employees such as Bostick, it was the finding of the Library's expert that:

> "With regard to annual salary and grade level there did appear to be race differences that cannot be explained by differences in tenure, education or age. The data also suggests that most of these differences were a result of large differences in the longer tenure employees, those hired prior to 1972."

Significantly, the Library's report concluded:

> "The overall pattern of results suggests the present salary and grade disparity for the longer tenure employees may be the residual effect of past personnel policies."

With regard to employees hired after 1972, both experts concluded that there still existed a statistically significant pay and grade disparity of substantial magnitude attributable to race between white and black employees at the Library for the years 1972 through 1974.

From 1972 on, the Library has maintained or acquiesced in policies and practices which favor white ap-

plicants and employees with regard to their educational achievements — white employees received and receive substantially more pay per year of education than identically situated black employees.

The district court indicated that it was not convinced that the statistical evidence demonstrated a "causal connection between any racial discrimination at the Library and the decision not to reclassify Bostick's position" App. The court's findings with regard to the statistical evidence presented are at odds with the meaning of statistical data in cases of this type. Statistics cannot isolate a causal relationship between evidence of patterns of disparity and a particular employment decision affecting only one individual. See *Hazelwood School District* v. *United States,* 433 U.S. 299 (1977). Rather, they allow an examination of the patterns present in groups of similarly situated individuals to determine if there is a disparity in their levels of achievement as influenced by employment policies or practices. *Hazelwood, supra.* In this case, both statistical experts found a disparity between the pay and grade levels of black and white employees with the same or similar education and employment qualifications as Bostick. This disparity was attributed by both experts to race.

The statistics raise the inference that what happened to Bostick was the result of racial discrimination. The statistics should not have been rejected because they allegedly failed to establish a causal relationship, since this is not the nature of statistics.

Moreover, the District Court compounded its error by ignoring the legitimate results of the statistical analysis in its statement that the statistics did not sustain Bostick's burden of proving there was racial discrimina-

tion in the Library in 1972 affecting Bostick. (App. 39a-40a.) The question the Court should have addressed, and did not, was how the Library's past racially discriminatory policies and practices affected Bostick's employment opportunities in and after 1972.

The court's statements concerning the relevance and import of statistical evidence and the use of such evidence in Title VII cases were clear errors of law.

The use of statistics, this Court has noted, has played a particularly significant role in cases alleging patterns or practices of broad-based racial discrimination. See *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977). See also *Hazelwood School District* v. *United States, supra.*

Indeed, this Court has stated that:

> "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School District, supra,* at 307-08.

The evidence of discriminatory hiring and promotion practices in this case was confirmed by independent statistical analyses by experts retained by Bostick and the Library. The lower courts' misapplication of this evidence and their inability or unwillingness to consider the impact of this data is clear error requiring reversal and guidance from this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

First District Court Decision

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. 1633-72

August 20, 1973

[¶ 8785] Joslyn N. Williams et al., *Plaintiffs*

v.

L. Quincy Mumford et al., *Defendants.*

[*Statement of Case*]

Jones, D.J.: This is a suit for declaratory, injunctive, and monetary relief against allegedly racially discriminatory practices at the Library of Congress. The defendants are L. Quincy Mumford, the Librarian of Congress, and Robert W. Hutchison, the Library's Director of Personnel. Jurisdiction is based on title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C.A. § 2000e-16, which specifically brings federal employees, including those at the Libarary of Congress, within the coverage of the Act. Presently pending before the Court are the plaintiffs' motion and application for class action determination and the defendants' motions to strike the class action allegations, to sever the claims of the two individual plaintiffs, to dismiss as to defendant Hutchinson, and for a protective order. The motion to certify as a class action will be denied, the claims of the two plaintiffs will be severed, the protec tive order will be granted,[1] and the defendant Hutchison will be dismissed.

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[1] At the time of the oral hearing on the motions, it was agreed by counsel that the question of the scope of discovery against which the protective order is sought would be governed by the ruling on the motion for class action certification.

In their amended complaint,[2] the plaintiffs bring this suit as a class action under Fed. R. Civ. P. 23(a), 23(b)(2) and (3) on behalf of all black persons currently employed at the Library, all those black persons who were employed by the Library at any time since 1960 but who are no longer employed, for whatever reason, and all black persons who unsuccessfully sought employment with the Library at any time since 1960. Racially discriminatory practices relating to recruitment, hiring, promotion, segregated job classifications, and firing are alleged to have been conducted by the defendants. Although it has been held that a suit brought by a black alleging title VII violations is perforce a sort of class action for other employees similarly situated, *Jenkins* v. *United Gas Corp.*, [1 EPD ¶9908] 400 F. 2d 28, 33 (5th Cir. 1968), the requirements of Fed. R. Civ. P. 23 relating to class actions must still be fulfilled before that remedy may properly be invoked. *Arey* v. *Providence Hospital,* [4 EPD ¶7788] 55 F. R. D. 62, 67-68 (D.D.C. 1972). In this case the plaintiffs have failed to meet the requirement of Fed. R. Civ. P. 23(a)(3) that their claims be typical of the claims of the class, as well as the requirement of Fed. R. Civ. P. 23 (b)(3) that the class action method of adjudication be superior to other available methods for the "fair and efficient" resolution of the controversy. In this connection, several concerns uniquely related to title VII suits against federal government agencies dictate that this case not be maintained as a class action.

[*Plaintiff's Claims Unique*]

The claims of the individual plaintiffs demonstrate their unique nature, and thus preclude the plaintiffs from meeting

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[2] This case was originally brought to enjoin the alleged unlawful firing f the plaintiff Williams under circumstances outlined, *infra.* After denial of the plaintiff Williams' motion for summary judgment,leave was granted to file an amended complaint under title VII, 180 days having elapsed since the filing with the Library of the initial complaint of discrimination and final action not having been taken. The isntant class action complaint, joing the plaintiff Bostick and ading the defendant Hutchison, was then filed.

the typicalness requirement of Fed. R. Civ. P. 23(a)(3). In June, 1972, over five years after the plaintiff Williams had been hired as a copyright examiner, he was informed that his employment would be terminated in July because of flase statements in his employment application.[3] Williams alleges that in an attempt to gain time for negotiation he was coerced into signing a resignation effective August 11, 1972. On that date, Williams unsuccessfully attempted to withdraw that resignation. Still later on the 11th, Williams filed a complaint with the Equal Opportunity Ofice of the Library, alleging that his firing was for racially discriminatory reasons. Shortly thereafter, the original complain in this case was filed.[4]

In the amended complaint, the plaintiff Bostick alleges that since he began his employment at the Library in 1947 on three occasions he has requested a job reclassification for purposes of promotion. In the first two attempts, the reclassifications became effective approximately six and four years later, respectively. The third request for promotion has been pending for over two years. Bostick alleges that white employees are promoted without their request, and that whites hired at the same time as he have attained far higher grade levels because of racial discrimination. Bostick is a "visual information specialist" in the Congressional Research Service of the Library. The position is unique. No one else holds such a position in the Library.

[*Class Action Not Proper*]

From the foregoing, it is apparent that the *claims* of the named plaintiffs in this case lack the typicalness of the claims

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[3] Although the truth of the statements in the application was at issue in the earlier stages of this letigation, counsel for the plaintiffs admitted at the ral hearing on the motions that the statements were in fact false. Transcript 13-14. Williams ccontends, however, that in order to obtain a job he had to demonstrate qaualifications superior to those of white applicants. Thus, he allegesthat the false statements in the application were the result of racial prejudice that would have denied him the job if he had not lied.

[4] See note 2, *supra.*

of the class that is needed to make them proper class representatives. Whether Williams resigned or was fired, he has admitted to making false statements on his original application for employment; Bostick is employed in a unique capacity, one given to classification dispute, as is evident from the allegations of the complaint. Even though both of the plaintiffs are black and the charge of the complaint is racial discrimination, the cases of the plaintiffs are too far removed from the general policy and patterns of discrimination alleged in the complaint. Each of their claims of discrimination is unique, and thus the Court holds that neither is a proper class representative. *See Smith* v. *North American Rockwell Corp., [2 EPD* ¶10,214] 50 F.R.D. 515 (N.D. Okla. 1970).

In reaching this conclusion, the Court is fully cognizant of the rule that in determining whether a case should proceed as a class action the question to be answered is not whether the plaintiffs will prevail on the merits, but rather whether the requirements of Fed. R. Civ. P. 23 have been met. *Halverson* v. *Convenient Food Mart, Inc.,* 458 F. 2d 927 (7th Cir. 1972); *Miller* v. *Mackey International, Inc.,* 452 F. 2d 424 (5th Cir. 1971). Thus in describing the allegations of the individual plaintiffs, no view is rendered on the possible success of their claims on the merits.

The Court imposes no requirement that the plaintiffs show that they were discriminated against individually before they may maintain a class action. *Hadnott* v. *Laird,* [4 EPD ¶7678] 149 U.S. App. D.C. 358, 365 n. 21, 463 F. 2d 304, 311 n. 21 (1972). But the Court is equally mindful that proof of racial motivation alleged by the plaintiffs to have occurred in their situations does not thereby prove the claims of those whom they seek to represent. Relief against the discriminatory practices alleged in the complaint hinges upon proof that each practice is prohibited conduct that has been engaged in by the Library. In view of the potentially severe res judicata consequences of class suits, the Court must be careful to ascertain that the requisite typicalness of the plaintiffs' claims is pre-

sent.Therefore, the Court does require that the plaintiffs be members of the class they purport to represent with claims typical of that class so as to guarantee effective representation of the class members. Because the other members of the potential class clearly are not similarly situated to the plaintiffs, whose claims of discrimation involve unique circumstances, the plaintiffs are not proper class representatives and the motion to certify the class will be denied. See *Huff* v. *N.D. Cass Co.*, [4 EPD ¶7775] 468 F. 2d 172 (5th Cir. 1972) (reheard en banc Oct. 30, 1972, decision pending); Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1218-19 (1971).

[*Superior Method Requirement*]

Even if the plaintiffs were proper class representatives, however, the requirement of Fed. R. Civ. P. 23(b)(3) that a clas action be "superior to other available mehtods for the fair and efficient adjudication of the controversy" has not been met. See, *e.g.*, *Wilcox* v. *Commerce Bank of Kansas City*, 474 F. 2d 336, 345 (10th Cir. 1973). This requirement is particularly significant in title VII suits against the federal government authorized by the 1972 amendments, *supra*.

Although the 1972 amendments for the first time made title VII specifically applicable to the federal government, it has been well established that the federal government has no license to discriminate. *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). The 1972 amendments to title VII have removed the final barrier to suit, the defense of sovereign immunity, and federal employers are now fully sub ject to its strictures. But federal employees have long had and still have advantages over their provately employed counterparts in remedying alleged illegal conduct by their employers. Title VII is frequently the only basis upon which victim of private discrimination may proceed. On the other hand federal employees have long been able through judicial action to require agencies to follow their own personnel procedures and

regulations. *Service* v. *Dulles*, 354 U.S. 363 (1957). Thus, unlike the situation of the employee in the private sector, effective administrative remedies against racial discrimination are available to federal employees outside of title VII, and the need for class action adjudication is less apparent than in instances in which title VII alone is in the picture. The circumstances of this case are particularly illustrative.

The Library of Congress has had regulations for processing complaints of discrimination since at least 1967. Library of Congress Regulation [LCR] 2010-3. That regulation requires the Librarian to take corrective action upon a finding of discrimination at the final administrative step. *Ringer* v. *Munford*, [5 EPD 8481] 355 F. Supp. 749 (D.D.C. 1973). Given this effective administrative remedy outside of title VII, the Court finds that a class action is not the superior method of adjudication in this case, and thus the motion to certify the class under Fed. R. Civ. P. 23(b)(3) must be denied on that basis.

[*Administrative Record*]

There is yet a third independent ground upon which the motion to certify the class must be denied. Although the case is brought as a class action aleging across the board racially discriminatory practices throughout the Library, neither plaintiff raised any allegation of class discrimination in his administrative complaint of discrimination before the Library.[5] Thus the allegatins of class discrimination have not proceeded through the proper exhaustion of administrative remedies, and cannot form the basis for a class action at this time. *Hackley* v. *Johnson*, [6 EPD 8725] _____ F. Supp. _____, n. 11 (D.D.C. July 13, 1973) (Gessell, Jr.) (dictum). Title VII suits against federal employers are normally to be reviews of administrative action. *Id.*, _____F.Supp. at _____. As such,

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[5] LCR 2010-3, § E and LCR 2010-3 (Appendix), § V.C make it clear that a group complaint could have been filed by either plaintiff.

the complaint should be limited to the allegations made at the administrative level.

In *Hackley,* unlike the present case, the Court had before it the final and complete administrative record. Judge Gesell concluded in that case that it was proper that the suit proceed solely as a review of that record. In the present case, no final administrative decision was made on the complaint of either plaintiff within 180 days of the filing of the complaint, and therefore the plaintiffs had a right to file suit in this Court. 42 U.S.C.A. § 2000e-16)c). Of necessity, the instant suit cannot be decided solely on the basis of a review of the administrative record because a complete record does not exist. But given the policies of title VII suits against the federal government, even the de novo proceedings in this Court should be restricted to the matters raised in the administrative complaint. The motion to certify as a class actin must therefore be denied.

A contrary result is not required by the many decisions under title VII concerning private employers which have read the initial complaint to the Equal Employment Opportunity Commission [EEOC] broadly in finding sufficient exhaustion to form the basis for a class action. First, the unique status of federal employees even without title VII mandates that complete exhaustion be required. Second, even under the broad principle that an action brought pursuant to title VII should be limited "to the scope of the EEOC investigatin which can reasonably be expected to grow out of the charge of discrimination," *Sanchez* v. *Standard Brands, Inc.,* [2 EPD 10,252] 431 F. 2d 45, 466 (5th Cir. 1970), the plaintiffs have not sufficiently exhausted their administrative remedy to bring this case as a class action.

The allegations of the cmplaint, it will be recalled, are: (1) that the plaintiff Bostick was denied promotion in a unique job; and (2)that the plaintiff Williams was fired because of his race, and not because of his admittedly false statements on his employment application. It cannot be expected that an

investigation of these charges would reasonable be expected to encompass the across the board allegations of discrimination which the plaintiffs have made in their complaint, covering the entire recruitment, hiring, promotion, and termination practice in the entire Library of Congress. In all likelihood, their allegations would not lead to such a broad investigation even within the two departments in which the plaintiffs were employed.[6] At the same time, it must be recalled that either plaintiff could have filed his initial charge with the Library as a group complaint, note 5 *supra.* Neither did, In these circumstances the scope of the instant suit cannot be expanded byond the allegations of discrimination against the plaintiffs merely by adding class actin language in the complaint.

[*Other Rulings*]

What has gone before indicates that the claims of the individual plaintiffs, unique in their nature, must be seveed as improperly joined under Fed. R. Civ. P. 20. The broad ranging discovery sought by the plaintiffs relating to the Library's entire employment file since 1960 will be restricted to matters relating to the plaintiffs' individual claims.

The motion of the defendant Hutchison to dismiss will be granted. Under the 1972 amendments, the "head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C.A. § 2000e-16)c). Thus the defendant Hutchison, the director of personnel, is not a proper defendant and should be dismissed. Moreover, it is clear that any relief that the Court may subsequently order on the individual claims of the plaintiffs can be afforded by orders against the remaining defendant, the Librarian of Congress.

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[6] In this respect, the attempted reliance by the plaintiffs on the findings of racial discrimination in the Library by the hearing examiner in *Ringer* v. *Mumford,* [5 EPD 8481] 355 F. Supp. 749 (D.D.C. 1973) is misplaced. The Court did not hold that those findings were not arbitrary and capricious. It had no occasion to review those finding of class-based discrimination and still has none. 355 F. Supp. at 753, 754n.11.

Therefore, it is this 17th day of August, 1973, Ordered:

1. That the motion of the plaintiffs for certification as a class action be and the same is hereby denied:

2. That the motion of the defendants to sever the claims of the individual plaintiffs be and the same is hereby granted;

3. That the motion of the defendants for a protective order be and the same is hereby granted and the requests for discovery served upon the defendants shall be limited to matters relating to the administrative complaints of discrimination filed with the Library by the plaintiff Williams on August 11, 1972; and by the plaintiff Bostick on April 19, 1972; and

4. That the motion to dismiss of the defendant Hutchison be and the same is hereby granted.

First Court of Appeals Decision

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

No. 73-2120

JOSLYN N. WILLIAMS AND ROBERT L. BOSTICK, *Appellants,*

v.

L. QUINCY MUMFORD, LIBRARIAN OF CONGRESS, ET AL.

Argued 31 Oct. 1974

Decided 10 Feb. 1975

Rehearing En Banc Denied April 4, 1975.

Before ROBB and WILKEY, *Circuit Judges, and* MARKEY,* *Chief Judge for the United States Court of Customs and Patent Appeals.*

WILKEY, *Circuit Judge:*

Williams and Bostick are black employees of the Library of Congress. Bostick claims that from the time he began his employment with the Library in 1947 he has been subject to racial discrimination as regards his job classification and promotion. On or about 19 April 1972 Bostick filed a formal complaint alleging discrimination with the Equal Employment Opportunity (EEO) Office of the Library of Congress. Four months later he amended his complaint and alledged discrimination affecting all other black employees of the Library. In November 1972 the EEO Office returned the amended complaint, stating that the office was not equipped to handle broad inquiries into the general policies and practices of the Library.

Williams had been employed as a copyright examiner with the Library since June 1967. Soon after he began his employment with the Library he was elected president of

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

Local 1826 of the American Federation of Government Employees, a union which represents Library employees and president of a task force named "Black Employees of the Library of Congress." Williams alleges he was active in promoting equal employment in the Library and in aiding employees who brought discrimination actions. In June 1972 he was given notice of removal effective 21 July 1972.[1] The removal was based on charges of material misrepresentations relating to his schooling, made on his 1967 application for the position of copyright examiner. In lieu of removal, on 21 July 1972 the Library accepted a resignation submitted by Williams to be effective on 11 August 1972. However, shortly before the effective date of his resignation, Williams requested that his resignation be withdrawn. After the Library refused to allow the withdrawal, on 11 August Williams filed his administrativ complaint with the EEO Office, alleging that his resignatin was coerced and that his removal was racially motivated.

Three days later Williams also filed in the District Court an action solely on his own behalf, alleging that his removal was the result of racial discrimination and that his resignation had been coerced. On 20 March 1973 Williams filed an amended complaint, adding an allegation that 180 days had passed without final administrative action on his administrative complaint. At this point Bostick's allegations of discrimination were also added to Williams' complaint. Finally allegations were added alleging discrimination against all blacks currently employed by the Library all blacks who had been employed at any time since 1960, and all blacks who had sought employment unsuccessfully since 1960, thus making the complaint on its face a classaction

On 20 August 1973, after a hearing, the District Court denied Williams' and Bostick's request for class certification.

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[1] Williams also contends he was given the notice of removal just one week before he was to address the American Library Association's convention about the racial employment policies and practices of the Library.

The denial was based on two grounds: First, that Williams' and Bostick's claims were not typical of the claims of the class they sought to represent as required by Rule 23(a)(3), Federal Rules of Civil Procedure. Second, given the effective administrative remedies available to federal employees apart from Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972,[2] the class action was not "superior to other available methods for the fair and efficient adjudication of the controversy" as required by Rule 23(b)(3), Federal Rules of Civil Procedure.

On 25 September 1973 an appeal from the refusal to certify a class action was taken.[3] We are presented with the question whether the refusal by a district court to certify a class action constitutes an appealable order. On the facts of this case, we decide that such an order is not appealable and therefore dismiss this appeal for lack of jurisdiction.

I. APPEALABILITY UNDER 28 U.S.C. §§ 1291

[1] The principal source of our jurisdiction to hear appeals from the District Court is 28 U.S.C. § 1291 which provdes: "The courts of appeals shall have jurdisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." Our task, thus, must be to determine whether the refusal to certify a class action constitutes a final decision. A final decision is not necessarily "the last order possible to be made in a case . . .';[4] however, to be "final" it must have the effect of resolving litigation on the merits. We have been instructed by the Supreme Court to give a flexible interpretation to "final decision" when used in the context of section 1291. As a result, the requirements of finality must be

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[2] 42 U.S.C. § 2000e-16.

[3] The District Court refused a request to certify the question for appeal under 28 U.S.C. § 1292(b) on 10 October 1973.

[4] *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964).

given a "practical rather than a technical contructin."[5] "The inquiry requires some evaluation of the competing considerations underlying all questins of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 [70 S.Ct. 322, 324, 94 L.Ed. 299] (1950) (footnote omitted)."[6]

[2] Applying this analysis, it becomes apparent that an order refusing to certify a class action is generally not a final decision within the meaning of section 1291.[7] It does not dispose of litigation. It is purely procedural in nature, in that it determines merely the parties to the action without expressing any judgment as to the merits of the case. Moreover, the correctness of the District Court's determination does not evade review since it, along with other prcedural decisions, is brought up on appeal after final disposition on the merits.

[3,4] Having stated the general rule two qualifications must be made and their relevance considered. First, it must be recognized that in some types of cases the refusal to certify a classification, as a practical matter, does dispose of the action. This is because the plaintiff has such a small monetary

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[5] *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949).

[6] *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 171, 94 S.Ct. 2140, 2149, 40 L.Ed.2d 732 (1974).

[7] *Caceres* v. *International Air Transport Assoc.*, 422 F.2d 141 (2nd Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2nd Cir. 1969); *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir.), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972); *Lamarche* v. *Sunbeam Television Corp.*, 446 F.2d 880 (5th Cir. 1971); *Siebert* v. *Great Northern Dev. Co.*, 494 F.2d 510 (5th Cir. 1974); *Walsh* v. *City of Detroit*, 412 F.2d 226 (6th Cir. 1969)(order permitting class action); *King* v. *Kansas City So. Indus., Inc.*, 479 F.2d 1259 (7th Cir. 1973); *Thill Sec urities Corp.* v. *New York Stock Exchange,* 469 F.2d 14, 17 (7th Cir. 1972)(denial of a motion to strike clas action allegations); *Gerstle* v. *Continental Airlines, Inc.*, 466 F.2d 1374 (10th Cir. 1972).

or other interest to be vindicated in the action that it would not be worth the plaintiff's time to continue the actin. In a series of recent cases, the Second Circuit has developed a body of law relating to this type of case, commonly referred to as the "Death Knell" doctrine. Secondly, in some cases a subsidiary controversy develops as an offshoot of the main litigation. A decision disposing of such an offshoot may be held to be a final decision even if the decision if procedural in nature, if it appears likely that the matter would evade review if taken on appeal after a final disposition of the entire litigation. This has been called the Collateral Order doctrine. We turn now to examine both doctrines in more detail

A. *The Applicability of the "Death Knell" Doctrine*

The "Death Knell" doctrine was developed in the Second Circuit in the crucible of Eisen v. Carlisle & Jacquelin. In Eisen I[8] the Second Circuit denied a motion to dismiss an appeal from a District Court order refusing to certify a class action. In that case, Eisen sued on behalf of himself and all odd-lot purchasers and sellers on the New York Stock Exchange alleging antitrust and Securities Act violatins. Eisen's claim for damages was only for $70.00. Appropriately enough, the court noted:

> We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. . . . If the appeal is dismissed, not only will Eisen's claim never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23 [Federal Rules of Civil Procedure].[9]

The Second Circuit faced the same issue soon thereafter in Green v. Wolf Corp. Plaintiff Green and the members of the class alleged that they had been required to pay an excessive

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[8] 370 F.2d 119 (1966), cert. denied, 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (1967).

[9] 370 F.2d at 120.

price for certain publicly held securities. As the court noted, "Green obviously does not intend to press what will probably be an enormously complex and expensive action to recoverless than $1,000."[10] In two cases consolidated under the title Korn v. Franchard Corp.,[11] the court decided that Mrs. Korn's suit for violations of the federal securities laws and for violations of New York law "will go no further without class suit designatin." Because Mrs. Korn's losses amounted to $386, the Second Circuit denied a motion to dismiss an appeal denying class actin certification. However, in the companion case the actual claims of the representative plaintiffs were for about $8,500. The court concluded, "[t]hat figure is close enough to the federal jurisdictional minimum for certain types of cases to suggest it is sufficient incentive to keep the case alive."[12] Accordingly, the "Death Knell" doctrine was inappropriate in that case and the appeal was dismissed.

In this case, it is clear that both Bostick and Williams have a sufficient incentive to continue this suit. Williams in his original complaint requested reinstatement in his former position. Today Williams in addition would be entitled to approximately two and a half years' back pay should be prevail,[13] an amount which we can safely assume is greatly in

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[10] 406 F.2d 291, 295 n. 6 (1968), cert. denied, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969).

[11] 443 F.2d 1301 (2nd Cir. 1971).

[12] 443 F.2d at 1306-07. More recently, the "Death Knell" doctrine has been specifically rejected by the Seventh Circuit, *King* v. *Kansas City So. Indus., Inc.*, 479 F.2d 1259 (7th Cir. 1973), and criticized by the Third Circuit, *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir.), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972). However, the vitality of the doctrine has been reasserted by the Second Circuit. *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (1974); *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094 (1974); *Herbst* v. *International Tel. & Tel. Corp.*, 495 F.2d 1308 (1974); *Shayne* v. *Madison Square Garden Corp.*, 491 F.2d 397 (1974).

[13] 42 U.S.C. § 2000e-5(g), made applicable to the Federal Government by 42 U.S.C. § 2000e-16(d).

excess of $10,000.00. As to Bostick, the request is for a higher GS rating, which he alleges was improperly denied him. In addition, it should be noted that the Equal Employment Opportunity Act amendments specifically provided for a reasonable attorney's fee for the prevailing party at the discretion of the court in just this type of case.[14] It certainly

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[14] 42 U.S.C. § 2000e-5(k), made applicable to the Federal Government by 42 U.S.C. § 2000e-16(d).

Hackett v. *General Host Corp.*, 455 F.2d at 622)23:

> Thus the "death knell" rule would operate only in that narrow category of cases where the object of the suit is the recovery of money damages, and where a statute affords federal jurisdiction regardless of amount. This narrow category is, however, significant for consumer advocates. But even in this field, the "death knell" rationale, based upon the assumption that no competent lawyer would undertake a complicated case to recover a small amount of money, must be qualified by several considerations. A number of federal statutes provide for the award of counsel fees and costs.[3] Indeed the statute under which 3. *E.g.* statutes providing for damages arising from the following improper actions, a single instance of which may harm individual members of large clases, additionally provide that successful plaintiffs' attorneys shall be awarded reasonable attorneys' fees and costs: Failure to disclose under the Truth in Lending Act 15 U.S.C. § 1640 (1971); Unlawful wiretapping, 18 U.S.C. § 2520 (1971). Other statutes place the decision of whether to allow reasonable attorneys' fees and costs within the discretion of the district court: Securities Acts Violations; 15 U.S.C. §§ 77k, 77www; 78i (1971). *See also* 28 U.S.C. § 2678 (1971) providing for reasonable attorneys' fees in suits involving torts committed by the Federal Government where its immunity has been waived.
>
> Mrs. Hackett sues contains such a provision. 15 U.S.C. § 15 (1971). If the "death knell" is to ring for her case the rope is in her attorney's hand. There is no certain basis for the assumption that an interested holder of a small claim will be unable to prevail upon a private attorney to pursue that claim in the hope of being compensated by the award of "reasonable counsel fees" against a wrongdoer. Moreover the burgeoning in recent years of interest in publicly supported legal service organizations and of private support for legal aid and public interest law firms cannot be disregarded.[4] Many small but im-

may be questioned whether the "Death Knell" doctrine can ever be applied to a case where attorney's fees are available to the prevailing party.[15]

B. *The Applicability of the Collateral Order Doctrine*

The Collateral Order doctrine had its origins in the Supreme Court case of Cohen v. Beneficial Industrial Loan Corp.,[16] in which the Court considered the constitutionality of requiring a plaintiff in a New Jersey federal court to post bond to insure payment of defendant's attorney's fees as required by New Jersey statute. The case was "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[17] In Cohen the interlocutory order being appealed was effectively immune from review after judgement. If the District Court's decision not to apply the New Jersey statute were not reviewable at that point, the defendant would, as a practical matter, be denied any protection under the statute. Eisen III[18] is a more recent application of the same doctrine. The District Court decided that the defendants would be required to bear 90% of the cost of notice to the plaintiff class of odd-lot buyers and sellers. Obviously, even if the defendants could have theoretically sought to collect their outlay had they prevailed, there would be little practical possibility of collecting over $20,000 from the over two million members of the class. As the Supreme Court noted on appeal from Eisen III:

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portant 4. See Note, The New Public Interest Lawyers, 79 Yale L.J. 1068 (1970). claims heretofore, for purposes of litigation, beyond the pale of financial practicability, have been successfully litigated by such organizations in recent years. Thus an adverse class action decision may ring out as a death knell on far fewer occasions than superficial analysis would suggest.

[16] 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

[17] 337 U.S. at 546, 69 S.Ct. at 1226.

[18] *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005 (2nd Cir. 1973), affirmed on this issue, 417 U.S. 156, 94 S.Ct. 2140, 2150, 40 L.Ed.2d 732 (1974).

> Analysis of the instant case reveals that the District Court's order imposing 90% of the notice cost on respondents likewise falls within "that small class [of decision which finally determine claims of rights separable from, and colateral to, rights asserted in the action, too important to be denied review and too independent to the cause itself to require that appelate consideration be deferred until the whole case is adjudicated]." It conclusively rejected respondents' contention that they could not lawfully be required to bear the expense of notice to the members of the petitioner's proposed class. Moreover, it involved a collateral claim unrelated to the merits of the petitioner's claims. Like the order in Cohen, the District Court's judgment on the allocation of notice cost was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it" . . . .[19]

[5] In this case, the refusal to certify a class action did not determine collateral claims completely independent of the merits of the case. The order is indistinguishable from other procedural determinations made in the course of discovery and trial. No funds were required to be expended as in Eisen, nor rights granted under independent statutes to be dispensed with as in Cohen. Above all, the correctness of the District Court's decision is subject to effective review on appeal from final judgement. We hold, in conclusion, that the District Court's refusal to certify a class action in this case did not constitute the "Death Knell" of the action nor was it a collateral and independent determination. Therefore, the decision was not a "final" one within the meaning of section 1291.

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[19] 417 U.S. at 172, 94 S.Ct. at 1250.

II. APPEALABILITY UNDER 28 U.S.C. §§ 1292(a)(1)

In the alternative, appellants contend that this court has jurisdiction over this appeal under 28 U.S.C. §§ 1292(a)(1) which provides:

> The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . . .

It is argued that the net effect of the refusal to certify a class action is consierably to narrow the scope of any possible injunction relief in the event plaintiffs ultimately prevail on the merits. Appellants cite in support of their position two cases from other Circuits: Brunson v. Board of Trustees[20] and Yaffee v. Powers.[21] Both cases are premised on the assumption that the refusal to certify a class action, since it would eventually affect the scope of equitable relief, itself constituted a modification of or a refusal to issue an injunction. We view this as an unwarranted expansion of the statutory language. By analogy to the reasoning of these courts, most procedural motions in an action requesting equitable relief would be appealable by *either* party. In this view we are supported by the Second Circuit. In its opinion in *City of New York* v. *International Pipe and Ceramics Corp.*[22] it rejected the argument that a refusal to certify a class action is appealable under section 1292(a)(1). The court noted, as do we, that the denial of

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[20] 311 F.2d 107 (4th Cir. 1962)(per curiam), cert. denied, 373 U.S. 933, 83 S.Ct. 1538, 10 L.Ed.2d 690 (1963).

[21] 454 F.2d 1362 (1st Cir. 1972). Since briefs were filed in this case, the Ninth Circuit has decided that the dismissal of a class action with leave to amend without class action allegations was appealable under section 1292(a)(1), *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177 (1974).

[22] 410 F.2d 295 (2nd Cir. 1969).

class action treatment constitutes neither issuance nor denial of an injunction.[23]

Although this precise question has never been presented to the Supreme Court, the Court has had to consider the scope of the injunc tion exception to the final judgment rule. *In Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*,[24] the Court held that the denial of a plaintiff's motion for summary judgment seeking injunctive relief was not a denial or refusal of an injunction within the meaning of section 1292(a)(1). This was because

> . . . the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing — that the case should go to trial. Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view "interlocutory" within the meaning of § 1292(a)(1).[25]

Although it is difficult to reconcile all of the case law interpreting section 1292(a)(1),[26] it would appear that the Supreme

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[23] The Court also stated that "[t]he cases cited by the City dealing with injunctive relief sought by school children to prevent discrimination on the ground of race have no application here." 410 F.2d at 299. The opinion offers us no further elaboration.

[24] 385 U.S. 23, 87 S.Ct. 193, 17 L.Ed.2d 23 (1966).

[25] 385 U.S. at 25, 87 S.Ct. at 195.

[26] *See, e.g., Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440 (1935); *Ettleson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188, 63 S.Ct. 163, 87 L.Ed. 176 (1942); *City of Morgantown* v. *Royal Insurance Co.*, 337 U.S. 254, 69 S.Ct. 1067, 93 L.Ed. 1347 (1949); *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955). In *Enelow* and *Ettleson* it was held that where the plaintiff's action was originally cognizable in law, a procedural motion deciding that defendant's equitable defenses should be tried first was held to be an appealable order under section 1292(a)(1)'s predecessor. On the other hand, in *City of Morgantown* and *Baltimore Contractors* it was held that when the

Court in *Switzerland Cheese* has opted for a narrow construction of the statutory language. Although an order denying class action certification *might at some later stage* have an effec t on the scope of equitable relief, such orders "in no way touch on the merits of the claim" and thus fall outside of the scope of the section.

Conscious as we are of our responsibility to maintain the jurisdictional balance drawn by the Congress under sections 1291 and 1292, we are particularly reticent to expand upon statutory language which was intended as a limited exception to the final judgment rule.[27] We emphasize that the District

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plaintiff's action was one cognizable in equity and the defendant's counterclaim was either one in law (*City of Morgantown*) or one in equity (*Baltimore Contractors*), the trial court's decision as to the order of the proceedings was interlocutory in form and substance and was not appealable under section 1292(a)(1). Of course, the importance of these decisions, as a practical matter, has been undercut by *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500, 79 S.Ct. 948, 3L.Ed.2d 988 (1959), and its progeny. However, these cases do give some indication of the meaningless distinctions which continue to be given some currency in this area of the law.

[27] In *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233 (1955), the Supreme Court discussed in some detail the legislative history of section 1292. Specifically, the Court discussed the fundamental policy determinations underlying the statute:

> The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction. This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal systems. . . . Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with the consequent waste of time and money. The choices fall in the legislative domain. They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or

Court did not state that the claim for an injunction had no merit, nor that it lacked jurisdiction to grant an injunction, nor even did it express any opinion as to whether injunctive relief was warranted at any particular point in the proceedings. The District Court denied certification of a class action under Rule 23, Federal Rules of Civil Procedure, a quite distinguishable action. As a result, appellants have failed to bring the order within the only arguably relevant exception to the final judgment rule, 28 U.S.C. § 1292(a)(1).

The appeal must therefore be dismissed.

Before BAZELON, *Chief Judge*, and WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, *Circuit Judges*.

ORDER

PER CURIAM.

It appearing that appellants' suggestion for rehearing *en banc* and amicus curiae's suggestion for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

Ordered by the Court *en banc* that the aforesaid suggestions for rehearing *en banc* are denied.

Statement of *Circuit Judge* SPOTTSWOOD W. ROBINSON, III, with whom *Chief Judge* BAZELON and *Circuit Judges* J. SKELLY WRIGHT and LEVENTHAL join, as to why they would grant rehearing *en banc*.

SPOTTSWOOD W. ROBINSON, III, *Circuit Judge*:

It is hardly necessary in this age to argue the worth of the class action in our ever-expanding system or

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general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent or approval of the appellate court.

348 U.S. at 181-82, 75 S.Ct. at 252 (footnote omitted).

jurisprudence. Over the years it has promoted the convenience of courts and parties infinitely, reduced the expense of lawsuits incalculably, and the contributed immeasurably to efficient judicial administration. It has, too, made its mark on the development of the law. The reports are dotted with landmark cases which without benefit of representative litigation would never have seen the light of day.

Even more profoundly, the class action has provided access to the judicial process for those who need it most. It has been the refuge of the poor, the hope of the downtrodden, and the salvation of the many whom our social institutions all too frequently victimize, unwittingly or otherwise. Truly it is said that "[t]he class action is one of the few legal remedies the small claimant has against those who command the status quo."[1]

In sum, as two leading authorities have aptly observed, "[i]t now is apparent that the increasing complexity and urbanization of modern American society has tremendously magnified the importance of the class action as a procedural device for resolving disputes affecting numerous people."[2] And since class-action litigation could be chilled by nonappealability of denials of certifications save in narrowly limited circumstances, it is highly important to ascertain whether the panel's decision to that effect is correct.[3] The importance of the question is underscored by the number of decisions it has generated in other circuits, and the difficulty of the problems by the conflict of opinion which plagues them.[4]

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[1] *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 186, 94 S.Ct. 2140, 2156, 40 L.Ed.2d 732, 748 (1974) (Douglas, J. dissenting).

[2] 7 C. Wright & A. Miller, Federal Practice § 1751, at 510 (1972).

[3] Rehearing *en banc* is warranted "when the proceeding involves a question of exceptional importance." Fed.R.App.P. 35(a)(2).

[4] *See Yaffee* v. *Powers,* 454 F.2d 1362, 1364-1365 (1st Cir. 1972); *Caceres* v. *International Air Transport Ass'n,* 422 F.2d 141, 142-144 (2d Cir. 1970); *City of New York* v. *International Pipe and Ceramics Corp.,* 410 F.2d 295, 298-299 (2d Cir. 1969); *Rodgers* v. *United States Steel Corp.,* 508 F.2d 152, 159-161 (3d Cir. 1975);

I would, accordingly, grant rehearing of this case *en banc*. That is not necessarily to say that the panel reached the wrong result. It is to say, however, that in my view the matter calls for consideration and decision by the full court.

Hackett v. *General Host Corp.*, 455 F.2d 618, 621-626 (3d Cir.), cert. denied, 407 U.S. 925, 92 S.Ct. 2460, 32 L.Ed.2d 812 (1972); *Brunson* v. *Board of Trustees,* 311 F.2d 107, 108-109 (4th Cir. 1962), cert. denied, 373 U.S. 933, 83 S.Ct. 1538, 10 L.Ed.2d 690 (1963); *Lamarche* v. *Sunbeam Television Corp.*, 446 F.2d 880 (5th Cir. 1971); *Siebert* v. *Great Northern Dev. Co.*, 494 F.2d 510, 511 (5th Cir. 1974); *Walsh* v. *City of Detroit,* 412 F.2d 226, 227 (6th Cir. 1969); *King* v. *Kansas City Southern Indus.*, 479 F.2d 1259, 1260 (7th Cir. 1973); *Thill Sec. Corp.* v. *New York Stock Exchange,* 469 F.2d 14, 15-17 (7th Cir. 1972); *Price* v. *Lucky Stores,* 501 F.2d 1177, 1179 (9th Cir. 1974); *Gerstle* v. *Continental Airlines,* 466 F.2d 1374, 1377 (10th Cir. 1972).

Second District Court Decision

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 72-1633

ROBERT L. BOSTICK, *Plaintiff,*

v.

DANIEL J. BOORSTIN, *Defendant.*

Judgment

Filed September 13, 1978

For reasons more fully stated in the attached Memorandum, Findings of Fact, and Conclusions of Law, it is this 12th day of September 1978, hereby

ORDERED and ADJUDGED that JUDGMENT should be and is entered for DEFENDANT.

/s/ LOUIS T. OBERDORFER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 72-1633

ROBERT L. BOSTICK, *Plaintiff,*

v.

DANIEL J. BOORSTIN, *Defendant.*

Memorandum, Findings Of Fact, And Conclusions Of Law

Filed September 13, 1978

Plaintiff, Robert L. Bostick, is employed by the Library of Congress as a visual information specialist, grade GS-13. In this action he alleges that officials at the Library have discriminated against him by failing to promote him, or to reclassify his position, to grade GS-15 in violation of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2, *et seq.* Specifically, he argues that the managers of the Library discriminated against him on the basis of race (1) in refusing his request that his position be reclassified to GS-15, (2) in de-emphasizing certain of his duties in connection with a classification audit of his position, (3) in refusing to assign additional duties to him in order to entitle him to an "automatic promotion plan" available to other employees, and (5) in failing to make him a beneficiary of the Library's affirmative action program. The Library counters that none of the decisions affecting Bostick were motivated by consideration of race, and that Bostick is classified as the highest grade level permitted by Civil Service Commission guidelines for someone performing the duties which Bostick performs.

For the reasons stated in the Findings and Conclusions which follow, the Court concludes that Bostick has failed to

prove discrimination on the basis of race. Accordingly, judgment will be entered for the Library.[1]

I. FINDINGS OF FACT

A. Bostick's Early Experience at the Library

Bostick is a high school graduate. He has taken post-high school courses in graphic analysis and visual information, but has earned no advanced degrees. He began his employment at the Library in mid-February 1947 as a graphic information specialist, in the General Research Section. No GS level was assigned to the position until the spring of that year. Until a grade assignment was made, Bostick was paid at the hourly rate of a CAF-11. Bostick was subsequently transferred to the Legislative Research Service (LRS) [later renamed Congressional Research Service (CRS)] where he has remained employed until the present.

During the period 1947 through 1950, Bostick very ably developed the graphic service of the Library from its inception to an efficiently organized program that successfully met every demand for illustrative material. The demand for graphic services increased steadily and in April 1950, a graphic analyst was appointed to work with Bostick. Shortly thereafter, despite the increased work load, LRS dismissed

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[1] Bostick's complaint was originally filed with Joslyn Williams as co-plaintiff. Together they sought to represent all black employees of the Library since 1960, in an action challenging a variety of employment practices. Their motion for class certification, however, was denied, and separate trials were ordered. *Williams* v. *Munford,* No. 1633-72 (D.D.C., Aug. 20, 1973), *appeal dismissed,* 511 F.2d 363 (D.C. Cir. 19750 (rehearing *en banc* denied), *cert. denied,* 423 U.S. 828 (1975).

Throughout this proceeding, Bostick's counsel has repeatedly sought reconsideration of class certification. It has long been apparent that Bostick occupied a unique position at the Library, and that the issues raised by his reclassification request are not typical of the class members he sought to represent. Accordingly, the Court has refused to reconsider the question of class certification.

Bostick's assistant. Since that time, Bostick has worked without in-house assistance.

In September 1952, Bostick requested that his position be reclassified to grade GS-12 to reflect a change in his job duties and an increase in his performance. In March 1953, LRS submitted Bostick's reclassification request to the Classification Office within the Library. In April 1953, the Classification Office informed Bostick that his request had been denied because his position was correctly classified as GS-11. In May 1953, the Library's Classification Officer wrote to the Civil Service Commission (CSC) to clarify the distinctions between the CSC classification standards for the grades GS-11 and GS-12 in Bostick's series. In late July 1953, the CSC ruled that Bostick's position was correctly allocated at grade GS-11.

In September 1953, the Library's Director of Personnel and the Library's Classification Officer wrote to the CSC in support of the reclassification of Bostick's position. They spoke very highly of Bostick, his work, and his responsibilities. The evidence at trial indicates that their assessments are as accurate today as they were then. They stated:

* * *

> Based on study of the grade GS-11 and GS-12 standards for Illustrator (General), GS-1020, it seems to us that the duties and responsibilities outlined in the description may be properly allocable to grade GS-12. The following are factors, we believe, that should be considered: (a) As demonstrated by the exhibits, there has been a steady increase in the complexity of assignments since the last allocation in April 1948 which complexity we do not believe was present at that time. (b) The demand for graphic analysis by Members and Committees of Congress has increased almost to the exclusion of work for the staff of the Legislative Reference Service or of the Library. (c) The consultative element in the position has increased to the point where Mr. Bostick

is consulted by Members on points of graphic presentation in much the same way as analysts in their respective fields in the Legislative Reference Service. In addition, in many instances, perhaps even the greater number, the presentation is left completely to his own discretion.

We wish to point out again that Mr. Bostick carries out his assignments without any technical supervision. When he receives requests for graphic presentation of a topic, he analyzes and inteprets data presented. He is frequently called upon to see that the initial data to be graphically presented is collected. If established authoritative sources exist, he gathers the data himself; if the services of an expert in a particular field are required, he relies upon the appropriate staff member to collect and evaluate necessary information.

. . . One of the factors in the recent development of the position has been the major shift of activity from work for other members of the Legislative Reference Service who do work for Congress to work, primarily, directly for Members and Committees of Congress. Thus, in a real sense the incumbent of the position acts as a top specialist and advisor for Congress as do the senior specialists and other high level specialists of the Library in other fields. . . . The personal contacts, the importance and effect of the work performed and the independence of operation which these facts imply cannot be overly emphasized.

. . . We would also liken this position to the position described in the GS-12 standards as the top specialist for an agency. In this case, in a real sense, Congress is the agency whose graphic work he advises on or performs and at times directs.

* * *

Nevertheless, in March 1954, the CSC informed the Library that Bostick's position was appropriately graded at GS-11.

Bostick appealed the CSC's decision to the CSC Board of Appeals and Review, and in late February 1955, the Board informed Bostick that his position was properly classified at the GS-11 level.

On July 21, 1955, Bostick submitted another reclassification request to LRS, together with a draft description of his job. LRS forwarded the request to the Library's Classification Office in February 1956. On August 16, 1957, the Library wrote to the CSC concerning the reclassification of Bostick's position. On September 15, 1958, the CSC replied that the Library had the authority to increase the grade of Bostick's position. In November 1958 the Classification Office determined to reclassify Bostick's position to GS-12 and the Librarian of Congress took the unusual action of personally visiting Bostick to review his work. On December 1, 1958, the Library reclassified Bostick's position to GS-12.

On February 8, 1961, Bostick asked Dr. Hugh Elsbree, the Director of LRS, about the possibility of reclassifying his position to a higher grade. In late August 1963, LRS sent to the Classification Office various papers submitted by Bostick in support of his request for reclassification to GS-13, and specifically requested early attention to Bostick's reclassification request. In December 1963, Mr. Clarence Witt of the Classification Office interviewed Bostick. In March 1964 the Classification Office interviewed Bostick. In March 1964 the Classification Office refused the request; Bostick's position was "redescribed" at the same GS-12 level.

In April 1964 Bostick filed a written position classification appeal with the Library's Assistant Director of Personnel. In early April 1965 Bostick's position was reclassified to GS-13 on the basis of an "incumbency allocation."[2] This

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[2] "Incumbency allocation" refers to the classification of a position at a higher than normal level because of the impact the particular strengths of the incumbent has on the job.

reclassification was explained at trial by Lester S. Jayson. From the early 1960's until his retirement from the Library in the mid-1970's, Jayson served first as Deputy Director, and subsequently, as Director of CRS.[3] Jayson took a personal interest in Bostick's case. Together with Burnish Walker, then Executive Officer of CRS,[4] Jayson was responsible for the use of an incumbency allocation in Bostick's case. He turned to this seldom employed device because he was aware that Bostick was at the full performance level for the visual information series, 1084, and because he knew that the CSC had on previous occasions ruled that GS-12 was the highest grade that Bostick's duties would support.

B. The Refusal to Reclassify at Issue in this Suit

In the third week of April 1971 Walker sent Bostick a memorandum stated that, to his knowledge, Bostick's position description had not been reviewed recently. The memorandum requested Bostick's comments on the accuracy and currency of the description of his position. By memorandum dated May 20, 1971, Bostick responded that, indeed, he did disagree with the position description. He argued that his responsibilities were substantially equal to those of other "specialists" in the CRS who are graded at GS-15:

* * *

> I submit that the duties and responsibilities of the Visual Information Specialist are comparable to those outlined in the CRS job description for "Specialist, GS-15" as it relates to:
>
> 1. Nature and Purpose of work, including
>
> A. Introduction, and B. Duties
>
> 2. Scope and Effect of Work

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[3] Jayson was named by Bostick as one of the Library officials alleged to have discriminated against him on the basis of race.

[4] Walker is another official alleged to have discriminated against Bostick on the basis of race.

3. Supervision and Guidance Received
4. Mental Demands
5. Personal Work Contacts

It should be noted, however, that since the incumbent's position was last reviewed, an additional element has been added: As the workload demands, and depending upon the availability of funds, the Visual Information Specialist prepares layouts, specifications and directions for the preparation of visual information material by private commercial specialists on a contractual basis. The incumbent has responsibility to review finished products, and to accept, reject or modify such visual material prior to delivery to Congressional offices. . . .

I further assert that the product of the other specialists is the *written presentation,* while that of the incumbent is the *visual presentation.* . . .

In June 1971 Walker requested from James Robinson a detailed description of Bostick's duties. During the early 1970's Robinson served with the CRS as the Coordinator of Research. He was responsible for the review and quality control of all outgoing CRS work, and he personally reviewed the work product of the entire CRS staff. He had day-to-day contacts with Bostick, and was familiar with the scope and nature of his work. Robinson was a forthright and credible witness who testified that he did the best he could to describe Bostick's position fairly and accurately. The memorandum Robinson submitted to Walker states:

. . . [The CRS graphics] program combines the work of (Visual Information Specialist) Mr. Bostick, the contract service of Art Services, Inc. and often the supporting informational services of the analysts of the CRS subject divisions. . . .

In terms of fanfold requests, the graphics workload has been divided roughly equally between Mr. Bostick

and Art Services . . . It should be noted that a fanfold request can vary in content from a simple mounting job or the lettering of a certificate to a complex map with multiple overlays or a series of 9 graphs. Both have had fanfold requests covering this range. In terms of cost to the service for this 49 week period [June 1970 — May 1971], CRS has paid Art Services $4,979 in contract job changes, and paid Mr. Bostick $19,500 in gross wages.

Though some project requests are received directly from Congressional offices by Mr. Bostick, the front office receives the bulk of these requests and I assign them. Assignment criteria are as follows: If Mr. Bostick's backlog is such that he can meet the deadline and no special photographic equipment is needed to complete the assignment, the request is assigned to Mr. Bostick; his cost to the Service is fixed and the quality of his work is excellent. In instances where the deadline is very short (a common occurance) or when substantial technical equipment is needed, or when Mr. Bostick's time is fully scheduled, or at his request, I assign the project to Art Services. Occasionally, but not often, a job will be split; i.e., Mr. Bostick consulting with the Congressional office and doing a conceptual sketch, and Art Services rendering the finished work. Such instances normally arise either when the job is sufficiently complex that graphics consultation is indicated, but working time is short, or when Mr. Bostick has begun routine assignments that he cannot finish in time to meet the deadline . . . When Mr. Bostick is absent or hurrying to finish a priority assignment, I have called upon Art Services to provide graphics consultation to Congressional requesters (in my presence); this alternative has proven quite successful. The Art Services graphics consultant and specialist normally used is Mr. Brown whose services are charged to CRS at the rate of $10.50 per hour, and whose pay scale is $7.00 per hour.

Within this general framework, Mr. Bostick's actual work month typically includes the following professional services: reception of graphics requests from Congressional offices by phone or in person; writing up such requests in standard CRS format; advising inquiring CRS analysts, Members and their staffs as to sound and exploitable graphics techniques and possibilities applicable to their purposes, executing a broad range of visual, graphic, design, geometric and artistic skills in the form of statistical or organizational charts, lettered tables, maps, illustrations, inscriptions, in ornamental lettering styles, layouts ready for the printer, and visual informational presentations for inclusion in the Congressional Record, hearings, reports, CRS monographs and committee prints; maintaining a working knowledge of and relationship with certain other Library divisions such as the Map Division, Photoduplication Service and Prints and Photographs; securing from CRS analysts the requisite economics, military, demographic, political or other specialized data for completion of assignments; the translation of these data and other information supplied by requesting offices into visually effective and accurate graphic forms. Since Mr. Bostick works without technical supervision or in-house graphics assistance, a good deal of his time is taken up by self-checking and proofing of his own work. . . . In large measure the option of utilizing out-of-house contract services has reduced the workload pressures and schedule demands upon Mr. Bostick without imposing significant supervisory or administrative duties upon him. This three-sided arrangement has since its inception a year ago been productive, harmonious and flexible enough to respond to the extreme variation of graphic services requested and the shifting volume flow typical of our enterprise at CRS.

In response to questions arising on occasion: (a) Art Services . . . can perform nearly all of the services provided by Mr. Bostick except his continued liaison with

> other departments of the Library. They would, of course, lack his personal acquaintance with a number of Congressional staff personnel and some Members, and could not be expected to provide the flexibility and convenience of a qualified in-house artist, (b) in terms of analytical work, Mr. Bostick frequentiy performs graphics analysis and computational tasks of a quite sophisticated nature; he is rarely, if ever, called upon to do economic, social, scientific or other forms of subject discipline analysis. Indeed this would be counterproductive in that CRS retains highly trained specialists specifically for such analytical duties, and they are expected to provide data and services for Congress through a graphics specialist on a priority basis equal to that for direct requests.

From August 1971 to May 1972 Bostick and CRS officials engaged in a protracted and ultimately unsuccessful endeavor to write a position description which would be acceptable to both Bostick and his CRS supervisors. In early May 1972 CRS sent a draft description of Bostick's position to the Classification Office with a request that his position be reviewed. Jayson testified that he specifically recommended to the Library's Classification Officer that Bostick's position receive the highest grade to which it was entitled under CSC standards in light of the duties which Bostick performed. The CRS referral was prepared by Basil T. Owens, then Assistant Executive Officer of CRS under Walker. It recommended that Bostick's position be awarded

> the highest possible allocation consistent with the work he performs as measured against Civil Service standards applicable to his occupational series.

On April 20, 1972, Bostick filed his administrative discrimination complaint with the Library's EEO Office.

Between July and October of 1972, James Lee, a Position Classifications Officer in the Library's Classification Office, reviewed Bostick's position. Lee met with Bostick per-

sonally and conducted a 2 1/2 hour desk audit to review the duties Bostick performed. Lee testified and the Court finds, that his audit of Bostick's position was conducted independently and without any interference or influence by CRS personnel; that the position description which CRS submitted to the Classification Office quite accurately reflected the duties which Bostick actually performed; and that CRS officials were responsive and cooperative in providing Lee with information concerning Bostick's position. This testimony is corroborated by credible testimony to the same effect from Jayson and Owens. Lee also testified as an expert on classification that Bostick does not perform the same kind of work as CRS "Senior Specialists" and "Analysts";[5] that Bostick was at the full performance level for his series; that grades above GS-12 are rarely found within the 1084 series; that the CSC standards for the 1084 series quite accurately describe the duties performed by Bostick; and that any research which Bostick performs in connection with his position is inherent in the position itself and does not exceed the research required at the GS-13 level.

In October 1972 Bostick received a copy of Lee's description of Bostick's position. Bostick discussed the description with Lee at length, and told Lee he was very disappointed with it. At the end of November 1972 Bostick returned his revised position description, unsigned, to Mr. Henderson, the Chief of the Economics Division of CRS. Bostick took the position that the description still did not reflect the full scope

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[5] In response to questioning by the Court, Jayson briefly described the typical profile of a GS-15 "specialist" at CRS. Specialists are among the top experts in the United States in their fields. A typical inquiry of a specialist in economics might be: if Congress reduced the social security tax by 1%, what impact would that have on inflation? Specialists are responsible for analyzing the available sources of information and doing independent research if necessary. Their typical work product is a written report, which is reviewed by the appropriate Division Chief at CRS, and by the Coordinator of Research for policy. With varying amounts of editorial revision, these reports are frequently published by Congress.

of his duties and responsibilities. Henderson nevertheless signed the position description and sent it to Walker.

In late December 1972 Robert L. Kuntzelman, then the Placement and Classification Officer for the Library, requested from the CSC an advisory opinion concerning the proper allocation of Bostick's position with respect to series and grade. In early March 1973 the CSC answered that based on the information which had been provided by the Classification Office, there was no basis for a reclassification of Bostick's position above GS-13.

Meanwhile, in early October 1972, Beatrice J. Branch, the Equal Opportunity Counselor responsible for investigating Bostick's discrimination complaint, submitted her investigative report. That report concludes that Bostick's complaint was for resolution through classification appeals, rather than through EO channels. In early March 1973 Lloyd Pauls, Equal Opportunity Officer, after conducting his own investigation, issued an independent decision concurring with Branch's conclusion. He stated, however,

> In the documents accompanying the position description that were sent to Civil Service it states ...:
>
> > Because of incumbent's more than 27 years as the Service's Visual Specialist his services as an advisor are frequently requested by various Senators, Congressmen, and their respective staffs. In this capacity he advises them on how best to achieve the desired results. He is recognized by peers in his field as an authority and is frequently contacted by other Agencies and private industry.
>
> It would appear to this Officer that a career employee with these qualifications not having received more than two promotions in 26 years of employment in the Library of Congress and having seen many other career employees come to the Library after he did and receive grade levels higher than he should receive some type of monetary gain.

Bostick has not appealed the Library's decision not to reclassify his position to GS-15, either through internal Library or CSC classification appeal channels. He is currently a GS-13, step 8, with a salary of just under $30,000 per year.

C. The Evidence of "Systemic Discrimination"

In support of his contention that Library managers made decisions affecting him based on race, Bostick introduced statistical evidence and reports by Dr. Charles Mann, an expert on statistical analysis. Dr. Mann testified at trial, and explained his analysis and conclusions in some detail. The statistical analysis was based on Mann's examination of the Library's computerized records of payroll information. Mann controlled for differences in education and tenure in the civil service, and compared salaries of black and white employees at the Library. His conclusion was that

> [a]fter taking into account measures of education and experience there is a consistent pattern of highly significant disparity in pay between Black and nonBlack employees of the Library of Congress. For the years 1974, 1975, and 1976, this disparity is estimated to be approximately three to four million dollars per year depending on the procedure used to measure education and tenure.

The Library did not dispute Dr. Mann's statistics. In an effort to show that the disparity evidenced by these statistics is unrelated to Bostick's failure to be promoted, the Library introduced the report and testimony of Dr. Claude Bartlett, another expert on statistical analysis. Bartlett conducted statistical analysis similar to that performed by Mann. In addition to considering disparity in pay, however, Bartlett also considered whether there was a disparity in the frequency with which blacks and whites were promoted at the Library and he considered separately employees of the Library who were hired prior to the effective date of Title VII and those who were hired after. Bartlett concluded:

Overall, the data indicate that for 1974, 1975 and 1976 there was not disparity in promotion rate between Blacks and Non-Blacks. With regard to annual salary and grade level there did appear to be race differences that cannot be explained by differences in tenure, education or age. The data also suggest that most of these differences were a result of large differences in the longer tenure employees, those hired prior to 1972. For employees hired more recently the disparity in treatment appeared to be substantially less in 1974, for both salary and grade. By 1975 grade differentials were similar to 1974, but salary differentials were not significant. By 1976, there were no unexplainable differences in grade of salary level. Thus, the overall pattern of results suggests the present salary and grade disparity for the longer tenure employees may be the residual effects of past personnel practices. The most recent data available for salary and grade indicates that no disparity can be attributed to race. Furthermore, for all employees, regardless of date of hire, no consistent disparity was found in promotion rate.

At trial, Bostick's counsel and expert argued that Bartlett's analysis could be reconciled with Mann's because subtle systemic discrimination has relatively little short-term impact and only takes its toll over time. The Library contended there was no basis for this inference. The evidence does not convince the Court that there was causal connection between any racial discrimination at the Library and the decision not to reclassify Bostick's positon. Although not necessary for its decision, the Court further finds that the evidence of disparate treatment of minority employees at the Library inferrable from Dr. Mann's report and testimony, when viewed in the perspective of Dr. Bartlett's testimony, does not sustain plaintiff's burden of proving that there was racial discrimination at the Library in 1972 affecting plaintiff.

D. The Affirmative Action Program and the Career Service Promotion Plan

Dr. Eugene Walton, the Library's Assistant Director of Personnel for Equality Programs testified at trial with some pride about the Library's affirmative action program, for which he has primary responsibility. His program de-emphasizes paperwork and, in Walton's words, is "result oriented." It is in large part based on the views and suggestions of minority Library personnel, which Walton collected by distributing questionnaires. The core of the program is the Training, Appraisal, and Promotion program (TAP), under which employees are selected and trained for more advanced positions known to be available within the Library. The affirmative action program also includes a tuition support program for career oriented education, and a program of outside research for validating Library job requirements.

While the TAP program is theoretically available at all grade levels, the results have been primarily at the GS-5 to GS-8 levels, where there have been job openings at the Library in which minority Library employees have been interested, and for which they could qualify with a feasible amount of additional training. In contrast, there is no position at the Library in Bostick's field for which he couid qualify with additional training.

The "automatic promotion plan" from which Bostick claims he was discriminatorily excluded is explained in a December 3, 1973 memorandum from Jayson to all CRS staff. The purpose of the plan is

> to assist in providing career service which will attract, develop, and retain persons having outstanding capabilities for work in the Congressional Research Service.

The plan's policy is to promote employees to the next higher grade when their work product indicates that they are regularly performing duties described in the position description for

the higher grade, and there is no reason to believe that they will continue to perform at that level. Necessarily, the plan is only available to employees in "ladder positions," i.e., where the work the employee performs is performed at the Library at increasing levels of complexity and responsibility. Bostick, at grade GS-13, was already one step above the last rung generally available in his ladder.

II. CONCLUSIONS OF LAW

Jurisdiction of the Court is based on Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e, *et seq.*

A. The Library's Refusal to Reclassify

Insofar as Bostick's claim is based on the allegations that the job he was actually performing was properly classifiable at GS-15, and that the Library's failure so to classify it was based on racial discrimination, Bostick arguably failed to exhaust his administrative remedies in the form of classification appeals.[6] *Cf. Haneke* v. *Secretary of Health, Education and Welfare,* 535 F.2d 1291 (D.C. Cir. 1976). However, since this claim is closely related to Bostick's allegations that his supervisors at the Library de-emphasized certain supervisory and research functions he alleges he performed, and that these supervisors failed to assign additional duties to Bostick's position for discriminatory reasons, the Court received evidence on all of the circumstances relating to Bostick's classification requests.

Under Title VII, the plaintiff has the burden of proving discrimination by a preponderance of the evidence. *Hackley* v. *Roudebush,* 520 F.2d 108, 117 (D.C. Cir. 1975). *McDon-*

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[6] Under Library of Congress Regulation 2016-8, § 2.A.2a, Library employees with classification grievances may pursue administrative appeals through the Library's Placement and Classification Office, the Library's Assistant Director of Personnel, or directly to the CSC.

nell Douglas Corp. v. *Green,* 411 U.S. 792, 802 (1973) sets the scheme for the allocation of the burden of proof frequently applied in Title VII cases. Under this scheme the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination by adducing evidence that he belongs to a racial minority and that he has received treatment different from that received by similarly situated non-minority employees. The burden then shifts to the defendant to articulate a non-discriminatory justification for the disparity in treatment. If the defendant can do this, the plaintiff is then expected to adduce evidence to show that this justification was not in fact the reason for the disparate treatment.

The evidence presented by the parties does not conveniently fit into the *McDonnell Douglas* scheme. The facts that GS-12 is the full performance level for the series in which Bostick's position is classified, and that Bostick is the only visual information specialist employed by CRS, made it difficult for him to show disparate treatment by reference to other visual information specialists. Bostick relied in large part on statistical evidence that blacks at the Library are paid less than whites with similar education, past work experience, etc., to create an inference that he, like other blacks at the Library, was the victim of disparate treatment which could only be explained by otherwise undetectable, but pervasive, racial animus. The Library countered the testimony and statistical studies of Bostick's expert, Dr. Charles Mann, with the testimony and analysis of their own expert, Dr. Claude Bartlett. On balance, the statistical evidence was inconclusive. Furthermore, it provided little guidance to the Court in deciding whether discrimination entered into the particular decisions which affected Bostick.

Assuming that the statistical and expert testimony that black employees at the Library have fared less well than other employees makes out a *prima facie* case, Bostick still could not have prevailed on his claim. The Library has satisfied the Court that the determination not to reclassify Bostick's posi-

tion to GS-15 resulted from the fact that Bostick's position was believed to be — and was — properly classified under the CSC position classification standards at grade GS-13. Racial discrimination did not enter into that decision.

The evidence further demonstrates that Bostick's supervisors did not in any way de-emphasize his capabilities, independence, supervisory duties, or research functions in order to subvert the review of Bostick's position description by the Classification Office of the Library.

Little evidence relating to the Library's decision to hire an independent commercial art contractor in lieu of staffing the Library's own graphics department, other than the Robinson memorandum to Walker, excerpts from which are set out above, was introduced at trial. Robinson's explanation there of the Library's needs, corroborated by his testimony before the Court, leaves little doubt that the plan was adopted and perpetuated as a result of business judgment exercised in good faith, and not for the purpose of foreclosing Bostick from additional managerial duties.

B. The Affirmative Action Program and the Career Service Promotion Plan

Bostick's claims that he was the victim of discrimination in connection with the Library's failure to direct any afirmative action program toward him, and the Library's failure to include him in any "automatic promotion plan" may be disposed of without lengthy analysis. Neither plan was made available to, or benefited, Bostick. However it is readily apparent that racial discrimination was not responsible for these facts.

There is no position at the Library in Bostick's field for which he could qualify with additional training of the dimension contemplated by TAP. The cold fact is that the Civil Service classification system severely limits the promotion opportunities at the Library of Congress for the most valuable specialists who lack advanced formal education credentials

and are not, as stated in the Robinson memorandum, "called upon to do economic, social, scientific or other forms of subject discipline analysis."

Bostick does not claim, however, that advanced education credentials were denied him because of his race or that the TAP-type training could have equipped him for subject discipline analysis or otherwise facilitated a higher classification for him.

Appealing as is his situation, the Court reluctantly concludes that Bostick has not made a persuasive case that he was denied the benefits of the Library's TAP program because of his race. The "automatic promotion plan" from which Bostick claims he was discriminatorily excluded was only available to employees in "ladder positions". Bostick, at grade GS-13, was already one step above the last run generally available in his ladder. It is evident, therefore, that discrimination on the basis of race played no part in the exclusion of Bostick from the plan.

C. Conclusion

Although Bostick, like the "specialists" employed at CRS acts as a consultant directly to Members of Congress, has a high degree of expertise in his field, and operates with considerable autonomy, his duties are not fully analogous to those of the CRS "specialist" who is classified at GS-15. To decide this case, the Court does not need to pass judgment on the personnel policy embodied in the CSC classification guidelines that experts in graphics are deserving of less monetary reward than experts in other disciplines. It is sufficient to observe that it is this judgment which is responsible for the difference in treatment between Bostick and those to whose positions he analogizes to his own, and that this judgment is not in any way a pretext for racial discrimination.

An appropriate Judgment accompanies this memorandum.

/s/ LOUIS T. OBERDORFER
United States District Judge

Second Court of Appeals Decision

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Docket No. 78-2194

February 22, 1980

[30,682] ROBERT L. BOSTICK ET AL., *Appellants*

v.

DANIEL J. BOORSTIN, LIBRARIAN, LIBRARY OF CONGRESS, *Appellees.*

On Appeal from United States District Court, District of Columbia. Affirmed.

Before TAMM and MIKVA, Circuit Judges, and HAROLD H. GREENE, United States District Judge for District of Columbia.*

GREENE, D.J.: This is an appeal from a judgment in favor of the government in a discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.C. § 2000e-16. The principal issue is whether the evidence supports the finding of the court below that the failure of the Library of Congress to promote appellant was not the product of racial discrimination.[1]

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* Sitting by designation pursuant to 28 U.S.C. § 292(a)(1976).

[1] The only other assertion of error that requires discussion is the claim that the District Court improperly refused to certify the suit as a class action under Rule 23(a)(3), F.R.Civ.P. An interlocutory appeal from an earlier refusal of Judge Jones to certify a class action in this case was dismissed by this court. *Williams* v. *Munford* [9 EPC ¶10,063], 167 U.S. App. D.C. 125, 511 F.2d 363 (1975), *cert. denied* [10 EPD ¶10,409], 423 U.S. 828 (1975). More recently, Judge Oberdorfer found that the claims of appellant and those of one Joslyn Williams, whose case has since been severed, were not typical of the claims of the class they sought to represent. Appellant essentially contends that his position was incorrectly classified, while Williams' claim relates to an allegedly improper penalty for

Appellant is a visual information specialist at the Library of Congress whose pay grade is GS-13. He contends that his position should have been reclassified to a grade GS-15 and that failure of appellee and his subordinates to effect such reclassification was racially motivated.

Appellant began working at the Library of Congress in 1947 as a graphic information specialist at grade GS-11.[2] Beginning in September 1952, he sought a reclassification of his position to a GS-12. These efforts were repeatedly supported by his superiors in the Library, but the Civil Service Commission for several years refused to grant its approval, ruling that the position was correctly classified.[3] Eventually, in December 1958, the Commission relented, and appellant's position was changed to a GS-12. In February 1961, appellant began a campaign to have the same position upgraded to a GS-13. Although that request was denied by a classification office in the Library of Congress, the Library's Assistant Director of Personnel decided to reclassify the position on the

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falsification of an employment application. The fact situations involving these individuals are relatively unique and not typical of any class (*Taylor* v. *Safeway Stores, Inc.* [10 EPD ¶10,410]. 524 F.2d 263 (10th Cir. 1975); *Wright* v. *Stone Container Corp.* [10 EPD ¶10,435], 524 F.2d 1058 (8th Cir. 1975); *Koos* v. *First National Bank of Peoria,* 496 F.2d 116, 1164-65 (7th Cir. 1974); Wright & Miller, Federal Practice and Procedure: Civil § 1764 (2d ed. 1972) and there is no basis for overturning the exercise of the District Court's discretion in failing to make a class certification. *City of New York* v. *International Pipe & Ceramics Corp.,* 410 F.2d 295, 298 (2d Cir. 1969); *Peterson* v. *Oklahoma City Housing Authority,* 545 F.2d 1270, 1273 (10th Cir. 1976); *Price* v. *Lucky Stores, Inc.* [8 EPD ¶9556], 501 F.2d 1177 (9th Cir. 1974).

[2] Appellant originally worked in the Library's General Research Section. He was later transferred to the Congressional Research Service where he has remained since.

[3] The decision was supported by several layers of decision-makers in the Civil Service Commission, including its Board of Appeals and Review.

basis of an "incumbency reallocation."[4] Appellant received his promotion to a GS-13 in April 1965.

[*Reclassification Attempt*]

In April 1971, appellant began his efforts to have his position reclassified to a GS-15. A review of his duties and responsibilities was conducted by James Lee, a Position Classification Officer,[5] who reached the conclusion that the position was properly rated as a GS-13, and that Civil Service Commission standards accurately described the work appellant in fact performed. Nevertheless, the Library proceeded to request the Civil Service Commission to render an advisory opinion concerning the proper grade for appellant's position. The Commission responded that there was no basis for classifying the job above GS-13,[6] and the Library accordingly made its decision not to effect a further reclassification. Although a review process was apparently available, appellant did not avail himself of the opportunity it provided[7] but instead filed an administrative discrimination complaint. An equal opportunity counselor and the agency's Equal Opportunity Officer determined after investigation that appellant's complaint was more appropriately regarded as a classification matter in the classification office and took no action. This suit in the District Court followed.

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[4] An incumbency reallocation is the reclassification of a position at a higher than normal level because of the strengths the incumbent brings to the particular job.

[5] Lee, who works in the Library's Classification Iffice, is black.

[6] The Commission noted that non-supervisory positions above grade GS-12 are not common in appellant's job series.

[7] The District Court found that arguably appellant failed to exhaust his administrative remedies by failing to pursue classification appeals. See *Haneke* v. *Secretary of Health, Education and Welfare,* 175 U.S. App. D.C. 329, 535 F.2d 1291 (1976). Nevertheless, it considered appellant's racial discrimination claims on the merits.

Appellant's position in the classified service is relatively unique, and the basic issue here is whether it was properly classified.

Under the Classification Act of 1949, 5 U.S.C. § 5101 et seq., the Civil Service Commission[8] has the responsibility for establishing standards for placing positions in their proper classes and grades. The Commission evaluated appellant's position and found that there was no basis for classifying it above GS-13.[9] Appellant concedes that the Civil Service classification series for visual information specialists on its face covers only grades through GS-12, but he argues that, notwithstanding that general limitation, and notwithstanding the more specific Commission advisory ruling that his position was appropriately classified at no more than a GS-13, the Library was guilty of discrimination because it failed to make an exception for his benefit.[10]

While the Library of Congress may not have been bound as a matter of law by the Civil Service Commission decision, the record does not reveal any factual justification for a Library departure from the Commission's determination. Cer-

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[8] Now the Office of Personnel Management.

[9] Appellant would equate this kind of classification analysis with the subjective judgments made by white supervisors that have been regarded as possible vehicles for discrimination. See, *e.g.*, *James* v. *Stockham Valves & Fittings Co.* [15 EPD ¶7842], 559 F.2d 310, 345 (5th Cir. 1977), *cert. denied* [15 EPD ¶8019], 434 U.S. 1034 (1978); *Pettway* v. *American Cast Iron Co. [7 EPD* ¶9291], 494 F.2d 211, 232 (5th Cir. 1974). This argument lacks merit for several reasons: (1) general classification decisions are unlike individual, subjective hiring or promotion decisions; (2) the basic judgment here was not made by appellee but by the Civil Service Commission which is not a party and has not been charged with discrimination; and (3) to the extent that the Library was involved, its principal judgment concerning appellant's proper classification was expressed by a black employee.

[10] Appellant also argues that the fault lies with his position description, and that he was the only person competent to determine the scope of his duties and responsibilities. The District Court rightly rejected this claim.

tainly the District Court could not be said to have erred when it failed to find discrimination based on the Library's refusal to disregard a Civil Service Commission opinion with respect to the appropriate classification of appellant's position.

Appellant contends that the classification reason given for the failure to promote his was merely pretextual[11] and conceals underlying discriminatory purposes. In this regard, he argues that he performed the same kind of work as white employees who were classified at grade GS-15,[12] that he had been performing supervisory functions and should have been reclassified for that reason, and that he was entitled to an inference of discrimination on the basis of statistics.

Appellant is a high school graduate working in the relatively non-professional field of a visual information specialist.[13] To be sure, the positions of various types of "senior specialists" and "analysts" are classified at grade GS-15, but these positions, as appellant's classification officer found, are not comparable to the one appellant holds. Such

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[11] The District Court assumed for purposes of analysis, and so do we, that appellant had made out a prima facie case of discrimination, and that the issue was whether legitimate, nondiscriminatory reasons existed for the Library's failure to promote appellant, as distinguished from reasons which were mere pretexts for discrimination.

[12] Appellant also makes the related argument that he should have been included in the Library's automatic promotion plan. That plan, which is aimed primarily at the agency's professional employees, was not applied to appellant because his job is "unique." The evidence showed that other black employees in other job classifications were included in the plan.

[13] According to the Coordinator of Research of the Congressional Research Service, as a visual information specialist appellant provides "visual, graphic, design, geometric and artistic skill in the form of statistical or organizational charts, lettered tables, maps, illustrations, inscriptions, in ornamental lettering styles, layouts ready for the printer, . . . visual information presentations" and similar services, but "he is rarely, if ever, called upon to do economic, social, scientific or other forms of subject discipline analysis."

specialists and analysts are frequently among the top experts in academic research submitted to the Congress on public policy matters,[14] and they usually have graduate degrees. Visual information specialists, on the other hand, are typically classified at grades GS-11 to GS-13.[15]

Appellant's claim that he is entitled to reclassification because he was or should have been exercising supervisory duties is unfounded. The Coordinator of Research, who supervised most of appellant's work and had the initial responsibility for describing his position, determined that appellant has no significant supervisory or administrative duties. In 1950, appellant did have one assistant, but the individual was dismissed after a few months, along with a number of other employees, on account of a congressionally-mandated budget cut. This brief and narrow supervisory experience hardly justifies a finding of discriminatory classification well over twenty years later.

The District Court found the statistical evidence to be inconclusive. We agree. One expert testified that there was a consistent pattern of disparity between black and non-black employees in the Library of Congress. Another expert, examining the same data, found no disparity in promotion rates between blacks and non-blacks. At its most favorable to appellant,[16] the evidence does no more than to establish a prima

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[14] We need not decide whether salary distinctions between experts in graphics and experts in such fields as economis, sociology, and other academic pursuits are appropriate as a matter of personnel policy. Suffice it to say that such distinctions cannot be regarded as racially discriminatory.

[15] There is an indication in the evidence that there is one visual information specialist at another government agency (Department of Commerce) whose position is classified as a GS-15. That particular employee appears to have far broader responsibilities than appellant. In any event, that one classification, which may violate Civil Service standards, cannot form the norm for all similar jobs throughout the federal service.

[16] The government's expert, unlike the witness produced by appellant, examined possible disparities in the frequency with which

facie case of discrimination[17] within the meaning of *McDonnell Douglas Corp.* v. *Green* [5 EPA ¶8607], 411 U.S. 792, 802 (1973) and *Hackley* v. *Roudebush* [10 EPD ¶10,403], 171 U.S. App. D.C. 376, 520 F.2d 108 (1975). We perceive no basis for holding incorrect the District Court's conclusions, based upon his findings of subsidiary facts,[18] that this prima facie case was rebutted by the Library, and that appellant had failed to show that the non-discriminatory reasons given by that agency constituted a pretext for discrimination. The judgment of the District Court is accordingly

Affirmed.

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blacks and whites were promoted, and he concluded that for all employees, regardless of date of hire, no consistent disparity in promotion rates could be established.

[17] With regard to the statistics, appellant urges upon us the recent decision of this court in *Davis* v. *Califano,* No. 78-1398. The court there held that statistical evidence may establish a prima facie case of individual discrimination, recognizing, however, that, as with any circumstantial evidence, the usefulness of statistical evidence depends on all the surrounding facts and circumstances (slip opinion, p. 10). In any event, the District Court here concluded that there was no violation of Title VII even if it be assumed that a prima facie case of discrimination was established by the statistics.

[18] The District Court's findings of fact may of course not be set aside unless they are clearly erroneous. Rule 52(a), F.R.Civ.P.; *Kinsey* v. *First Regional Securities, Inc.* [13 EPD ¶11,614], 181 U.S. App. D.C. 207, 557 F.2d 830 (1977). This rule applies to design, motive, and intent. *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 341 (1949).